THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

THE ANN ARBOR RAILROAD COMPANY,
Defendant in Error.

This is a writ of error to reverse an order of affirmance of the Circuit Court of Appeals of the Sixth Circuit.

This action was originally brought in the Circuit Court of Benzie County, Michigan, by the Western Union Telegraph Company to restrain the defendant from interfering with the rights of the complainant in a certain telegraph line along the defendant's railway of which the defendant had taken possession (Record, p. 3). The case made by the bill of complaint presented the following facts:

On the 25th day of September, 1890, the Frankfort and Southeastern Railroad Company, a corporation of the State of Michigan, owned a railroad from Frankfort to near Copemish in the State of Michigan. On that day it entered into a contract for the construction and maintenance of a telegraph line along the entire length of its railroad. Under this contract, copy of which was attached to

the bill, complainant built the telegraph line in question. It was the only line of telegraph on the railroad and was used under the terms of the contract until 1885. The Frankfort and Southeastern railroad was sold in 1892 to The Toledo, Ann Arbor and North Michigan Railroad Company, which afterward issued a mortgage upon the property, and in 1893 this mortgage was in default and the road passed into the hands of a receiver and was sold under foreclosure and passed to defendant railroad company. The bill set up the rights of the complainant under the Act of Congress of July 24th, 1866, and that independently of the contract it had the right to maintain its telegraph line upon the line of the railway.

The defendant thereupon filed its petition and bond for removal of the cause into the Federal Court upon the ground of diverse citizenship and upon the ground that the suit was one arising under the laws and constitution of the United States (Record, p. 12).

In the Circuit Court it filed answer and cross-bill (Record, pp. 14 and 20).

Thereupon certain facts were stipulated and the cause submitted.

This stipulation covered the facts stated in the second paragraph of the answer, the tenth paragraph of the bill, the fifth and seventh paragraphs of the cross-bill and admitted that those facts were true. In addition thereto it was admitted that all parties bought the railway with knowledge of the contract under which the telegraph line was built.

Record, p. 28.

These facts were in addition to the facts stated in the bill and not denied by the answer.

The allegations of the bill thus admitted are the following:

"FIRST. That on the 25th day of September, 1890, the Frankfort and Southeastern Railroad Company, a corporation organized under the laws of the State of Michigan, owned and operated a line of railway from Frankfort in the State of Michigan to the western terminus of the Toledo, Ann Arbor and North Michigan railroad, near Copemish, in said State of Michigan; that on said last-mentioned day, complainant entered into a contract with said Frankfort and Southeastern Railroad Company for the construction and maintenance of a telegraph line along the entire length of its said railroad, copy of which contract is attached to this bill and made a part hereof.

"SECOND. That in pursuance of said contract, in May, June and July, 1891, complainant built the telegraph lines provided for therein. One wire was erected for the joint use of the railroad company and complainant. A loop wire to Frankfort and back was put on the same poles for the exclusive use of complainant. From that time until October 1, 1895, both wires have been in constant use—the first by the railroad company and your orator and the last by complainant exclusively. These wires constitute the only means of telegraph communication with Benzonia and Frankfort. They run from a place now called Thompsonville to Frankfort. At Thompsonville they connect with the telegraph line of complainant running north from Grand Rapids on the Chicago and West Michigan Railroad.

"FOURTH. That said Wellington R. Burt is the president of said Ann Arbor Railroad Company and one H. W. Ashley, of Toledo, Ohio, is its general manager; that both of these parties have long been familiar with the terms of the said contract of complainant with the Frankfort and Southeastern Railroad Company and with the rights of complainant in the wires built on the line of said railroad, and your orator avers, on information and belief, that the said Ann Arbor Railroad Company purchased said railroad with a full knowledge of your orator's rights therein.

"FIFTH. Your orator avers that said Ann Arbor Railroad, acting through said Ashley, claims not to be bound by said contract made with the Frankfort and Southeastern Railroad Company and has given your orator written notice to this effect.

"SIXTH. Your orator is now and long has been doing an extensive telegraph business in many parts of the United States. On January 7, 1867, it filed with the Postmaster-General its acceptance of the provisions of the act of the United States passed July 24, 1866.

"EIGHTH. On or about the first day of October, 1895, said ANN Arbor Railroad, under the direction of its manager, said H. W. Ashley, took possession of complainant's said wires between Thompsonville and Frankfort and cut off their connection with its other wires and deprived your orator of all telegraphic connection with Frankfort and Benzonia. At the same time said company continued the use of said wires exclusively for its own business.

"TENTH. That on the 14th day of October, 1895, your orator reconnected the said telegraph lines running from Thompsonville to Frankfort and so again opened telegraphic communication with the latter place, and is now in full possession and use of said lines. The statements in this paragraph are alleged on information and belief."

The second paragraph of the answer is as follows:

"SECOND. As to the matters and things set forth in the third paragraph of the bill of complaint, this respondent alleges the facts to be as follows: That on or about the first day of March, 1889, the said The Frankfort and Southeastern Railroad Company executed a mortgage upon all of its property and assets of every kind and description, whether then owned or thereafter to be acquired by said company, to Henry Day and Albert C. Hall, as trustees, which mortgage was thereupon—to wit, on the 11th day of May, 1899—duly recorded in the county of Benzie, in which said property was for the most part located, and, as defendant believes, also in the counties of Manistee and Wexford, through or into which said line of railroad extended, and became and continued thereafter to be a first lien upon all the property and assets of said company of every kind and description. That said mortgage was made to secure the issue of bonds of said company to the amount of $235,000, which were duly issued and sold to divers and sundry purchasers, as defendant is informed and believes, at or about the time of the execution and recording of said mortgage. That at the time of the purchasing of the said railroad

of The Frankfort and Southeastern Railroad Company by said The Toledo, Ann Arbor and North Michigan Railroad Company, which took place in the month of May, 1892, said mortgage was an outstanding valid lien, securing the whole of the said issue of bonds upon the property of said The Frankfort and Southeastern Railroad Company so transferred to the said Toledo, Ann Arbor and North Michigan Railroad Company; that, as a part of the consideration of the said purchase and transfer, said The Toledo, Ann Arbor and North Michigan Railroad Company agreed and undertook to pay the indebtedness secured by said mortgage. That by said transfer and purchase the railroad and all the property of the said Frankfort and Southeastern Railroad Company became the property of said The Toledo, Ann Arbor and North Michigan Railway Company.

"This respondent further says that prior to the purchase of said property of the Frankfort and Southeastern Railroad Company—to wit, in the month of January, 1890—the said Toledo, Ann Arbor and North Michigan Railway Company had executed to the Farmers' Loan and Trust Company a consolidated mortgage upon all the property of said company then owned or thereafter to be acquired, being, as respondent supposes, the mortgage which is set up in the third paragraph of the bill of complaint. That said mortgage was made to secure an issue of bonds, a large number of which—to wit, about $1,300,000 in amount, were outstanding at the time of said purchase and transfer. That thereupon, by virtue of the terms of said mortgage, the same became a lien upon all the property of the said The Frankfort and Southeastern Railroad Company, subject, however, to the prior lien of said mortgage to said Hall and Day as trustees.

"This respondent further says that subsequently—to wit, on or about the month of January A. D., 1894, the indebtedness secured by said mortgage of the Frankfort and Southeastern Railroad Company became and was due, and the same being unpaid a suit was begun by the trustees named in said mortgage in this court to foreclose the same, and cause the property to be sold for the satisfaction thereof. That such proceedings were had therein as that all the parties interested were made parties to said suit, and thereupon a decree was rendered for the sale of the said property for the satisfaction of said indebt-

edness, and said property was sold on or about the first day of June, 1895, for an amount largely insufficient to satisfy the said debt to Albert C. Hall and George Lord Day, and thereupon a deed was made by order of said court to said purchasers for the same. And thereupon said purchasers caused to be incorporated under the laws of the State of Michigan a certain corporation named 'The Escanaba, Frankfort & Southeastern Railroad Company,' to which said property was duly conveyed and transferred by said purchasers, and thereupon the said The Escanaba, Frankfort & Southeastern Railroad Company duly transferred in accordance with law all its property and assets to this respondent, who is now the owner of the same. By virtue of the premises this respondent alleges that it became subrogated to and succeeded to all the rights of the mortgagees in said mortgage executed by said Frankfort & Southeastern Railroad Company.

" This respondent says it is true that said consolidated mortgage was foreclosed by appropriate proceedings in this court and the property covered thereby was sold under the decree entered in said foreclosure proceedings subject to the lien of the mortgage executed by the Frankfort & Southeastern Railroad Company as aforesaid so far as said lien extended and that the purchaser at said judicial sale has transferred and conveyed to this respondent all the property and assets so by him purchased as aforesaid. That by virtue of the premises this respondent has become subrogated to and succeeded to all the rights of the mortgagee under said consolidated mortgage. It is true that complainant was not a party to either of the said foreclosure suits."

The fifth and seventh paragraphs of the cross-bill of the defendant were as follows:

" 5th. That the Frankfort and Southeastern Railroad Company had prior to May, 1892, when your orator purchased its said railroad, duly complied with the terms of said contract by it to be performed, and in particular had furnished the poles and labor necessary in the construction of said line of telegraph.

" 7th. Since the allowance of said order of injunction and by reason thereof your orator and said telegraph company have been using and operating said

line of telegraph in substantially the same way as prior to the beginning of said suit."

Upon the agreed facts the Circuit Court held that the contract of September 25th, 1890, was purely personal to the Frankfort and Southwestern Railroad Company, and that upon the foreclosure of the mortgage of 1889 the telegraph company ceased to have any right upon the railroad and directed a dismissal of the bill.

Record, pp. 29 and 31.

From this decree an appeal was taken to the Circuit Court of Appeals, and that Court affirmed the decree of the Circuit Court, upon the same ground (Record, pp. 36, 44).

From that order the Western Union Telegraph Company appealed to this Court. It presents the following assignments of error.

First. The said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court rendered against The Western Union Telegraph Company, appellant, and in favor of the Ann Arbor Railroad Company, appellee, upon the trial of said cause.

Second. That the said Circuit Court of Appeals erred in holding that the interest of said appellant under the contract entered into on the 25th day of September, 1890, with the Frankfort and Southern Railroad Company was terminated by the foreclosure of the mortgage given to Henry Day and Albert C. Hall, as trustees, and that the appellant had no further rights along and upon the said railway.

THIRD. That the said Circuit Court of Appeals erred in holding that it had no power to ascertain the compensation, if any, due from the appellant to the appellee for the easement along and upon the right of way of the appellee's railroad.

FOURTH. That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court to the effect that the rights of the appellant under the said contract were purely personal, and that no foreclosure of its rights, obtained under the said contract, was necessary, and that its easement ceased by virtue of the foreclosure of the mortgage.

ARGUMENT.

I.

The contract of September 25th, 1890, granted to the telegraph company such interest in the railway as was required for the construction, maintenance and operation of a telegraph line, and such interest was not terminated by the foreclosure of the prior mortgage.

The Circuit Court of Appeals in its opinion treated the contract of September 25th, 1890, as equivalent to a lease by the telegraph company from the Frankfort and Southeastern Railroad Company of certain privileges for a time, and nothing more, and upon this theory arrives at the main conclusion in its opinion. This character of the contract seems to have been

assumed as beyond dispute, for there is no consideration whatever given in the opinion of the Circuit Court of Appeals to what this contract really does provide for the telegraph company.

This conclusion reached by the Court overlooks real stipulations and the real character and legal effect of this agreement

The contract in its recital contains a clear statement of the purposes of the contracting parties as follows:

"WHEREAS, the railroad company owns and operates a railroad between Frankfort and the western terminus of the Toledo, Ann Arbor and Northern Michigan railroad near Copemish, in the State of Michigan, *along which railroad and any extensions or branches thereof, it is proposed that a telegraph line shall be constructed, maintained and operated.*"

"NOW, THEREFORE," etc.

The contract then provides in the first and second paragraphs for the supply of material and labor for the original construction of the line, and the subsequent maintenance of the line, and in what proportions the materials and labor should be furnished by the contracting parties.

The third, fourth, part of the fifth, sixth and seventh paragraphs relate to the division of the uses of the line thus constructed as between the parties.

The eighth paragraph is an agreement to make the right to construct telegraph lines on this railroad an exclusive one so far as the railroad company could legally make it such.

The ninth provides for a mutual release of damages from neglect of employes.

The tenth assures the railway company the use of patents owned by the telegraph company, so far as the same may be necessary to properly carry on the busi-

ness of railroad telegraphing on the line of the railroad.

The Eleventh paragraph is as follows :

" It is mutually understood and agreed that the telegraph line, poles, wires and fixtures covered by this contract shall be the property of the telegraph company and shall form part of its general telegraph system, and shall be controlled and regulated by the telegraph company, which shall fix and determine all tariffs for the transmission of messages, and all connections with other lines and interests."

The twelfth paragraph provides that

" The provisions of this agreement shall extend to all railroads now owned, leased, controlled or operated, and to all railroads hereafter owned, leased, controlled or operated, by the railroad company, or by any company or corporation in which the railroad company, or by any company or corporation, in which the railroad company, may own a majority of the stock, or whose action it may be able to control by ownership of stock or otherwise, and the provisions of this agreement shall be and continue in force for and during the term of twenty-five years from the twenty-fifth day of September, 1890," etc.

This contract is construed by the Circuit Court of Appeals as being in all respects a mere personal contract terminable by the foreclosure of the mortgage.

This is, we submit, a fundamental misconception of the purpose and scope of the contract.

Notice that the expressed purpose of the contract is stated to be the construction, maintenance and operation of a telegraph line along the railroad, and any extension or branches thereof. It is a matter of which this Court will take judicial notice that every railroad needs as an adjunct to its successful operation a telegraph line. If this were not so, the provisions of this contract clearly show that it was deemed necessary

for this railroad to have a telegraph line in its operation. This line by the eighth paragraph was to be the only one on the railroad. Whether this eighth paragraph was valid or not as to excluding other telegraph companies from the right of way of the railway there is nothing invalid in the restrictions the railroad company thereby imposed upon itself during the period of the contract. It could not itself during the continuance of this contract build and operate its own lines. By the eleventh clause of the contract it is explicitly provided that the telegraph line, poles, wires and fixtures belonged to the telegraph company, and formed part of its general system of lines. It is also to be noted that while the railroad company itself could not under the eighth clause construct a line of its own during this contract, yet the telegraph company was under contract obligation to carry out the terms of the agreement to the very last day thereof in all its parts. No provision is made in the contract for the removal of any of the property either before the expiration of the twenty-five years or after it. That it should not become the property of the railroad company was provided against by the explicit terms of the eleventh clause of the contract. The railroad company did not contemplate a cessation of the operation of its railroad at the end of the twenty-five years. It would need a telegraph line then as much as before that time. Temporarily, at least, it would be dependent upon the telegraph line to be built under the agreement, even if it was contemplated that all rights of the telegraph company upon the line of the railway would cease at the end of twenty-five years with the bare right to remove the poles, wires and fixtures as its personal property.

Such temporary use by the railway company is, however, inconsistent with the thought of the removal of the line upon the end of the twenty-five years.

A consideration of all these features of this contract must, we think, satisfy any one that the contracting parties were not arranging for an occupancy upon this railroad for simply a term of years of the railroad by a telegraph line, and then the telegraph company's rights should cease, but they were proposing to have "*constructed, maintained and operated*" there a telegraph line which it was expected would be as indeterminate in its duration as the railroad itself. For it is to be remembered that the telegraph apart from its use by the railway company is as much of a public agency, and fulfills a public demand as important as the railroad itself. The poles, wires, instruments and batteries constitute a plant for public uses as much as the railroad itself.

It is no objection to this construction of this agreement that some of the provisions of the agreement terminate in twenty-five years. It will not be denied that the provisions as to cost of material, division of the uses of the lines and wires when constructed, the division of cost of maintenance, are temporary, and terminate in twenty-five years. So the provision in the eighth clause making the right of way exclusive so far as the railway company legally might.

The case of City of Los Angeles vs. Los Angeles City Water Company, 124 Cal., 368, is instructive upon the question as to whether this contract was a lease or not. The syllabus of the case is as follows :

"Agreement to pay for improvements.—Expiration of Contract.—Right of possession.—Tender.—Where the water company receives possession under the con-

tract of a small line of wooden pipes and agreed to construct iron pipes throughout the city, and build new water-works, as the demands of the city required, and at the expiration of thirty years to return the whole to the city 'upon payment to them of the value of the improvements made,' *et cetera*, which the city agreed to pay, the contract is not one of lease; but whether so considered or not, the rights of the parties at the expiration of the contract are fixed by its terms, and not by legal implication; and the city cannot reclaim possession from the water company without first paying or tendering the value of the improvements.

"Right to water rates.—Receiver.—Injunctoin.—The city not having paid or tendered the value of the improvements, and having no right to the possession of the works and no rights in the contracts between the water company and the ratepayers, and being adequately protected by the value of the improved water-works, cannot, through the appointment of a receiver and by means of an injunction, prevent the water company from receiving payment of water rates after the expiration of the period fixed by the contract.

"Rights of water company.—Mortgagee in possession.—The water company is substantially in the position of a mortgagee in possession, having a lien on the property involved as security for the performance of the covenants of the city contained in the contract, and without tender or payment its possession should not be disturbed or a receiver appointed.

"Injunction against city.—The water company, not having an adequate remedy at law, may enjoin the city from using its municipal power to take forcible possession of the waterworks."

In the above case McFarland, J., delivering the opinion of the court, says, at page 379:

"The city undertakes to contend that the contract is a lease pure and simple; and, as the contract according to the city's contention must be thrown into the category of a 'lease,' it contends for one of the well-known features of a lease of land; to wit, that at the expiration of the term the lessor has an immediate right of re-entry and possession. This position is not tenable. The written instrument in question cannot be categoried into any smaller class than that of a

'contract.' It is a contract with many and various covenants. It was not called a lease (however suggestive that might have been) by the parties who made it. The city entered into a contract by means of an ordinance, which was entitled, 'An ordinance contracting for the care, maintenance and improvements of the city waterworks.' The first section says that 'the contract' hereinafter set forth, *et cetera;* the second section describes it as 'this agreement;' it was afterwards said 'that at the expiration of the period of thirty years from the execution of this instrument they will pay,' *et cetera;* in another part of the instrument it is called 'this contract and ordinance;' in another place it speaks of 'the terms of this contract;' in another place it speaks of 'the approval of this contract.' The only place where there is any reference whatever to the contract as a lease is the agreement that the party of the first part will 'make no other lease, sale, contract, grant or franchise to any person or persons;' and this language can as well be construed as designating the instrument a 'sale, contract, grant or franchise' as designating it a 'lease.' In the opinion of the court below it is well said as follows: 'I do not perceive any theory which justifies the contention that the agreement is a lease as to the pipe lines, flumes and other "improvements" constructed by the water company. Manifestly, the city could not lease what it never had, and the present distributing system did not exist at the time the agreement of 1868 was executed. In fact, the system then existing has been entirely superceded and constitutes no part of the present plant. Neither can it be said with any show of reason that the distributing pipes and reservoirs constructed by the water company constitute improvements on the leased property and revert therewith and as a part thereof upon the termination of the lease." The instrument in question could as well be called a "contract of purchase," with all the incidents of such a contract following, as a "lease." It is, in fact, a contract by which the city agreed to give immediate possession to the water company of a small line of wooden pipes which the city then owned, and to allow it to build new water works throughout the city as necessity demanded, with covenants on the part of the water company that it would change what little the city had then in the way of waterworks into better ones, and would create new

works as fast as the demands of the city required; that the water company should have the right to do this and to collect water rates for a period of thirty years in consideration of the covenants entered into by the water company, and that upon the expiration of thirty years the city would pay the company for all the works which it should have created, and that the water company, upon payment therefor, should then deliver possession of all the waterworks, as they should exist at the end of the period, to the city. The rights of the parties do not rest upon legal implications; they are determined by covenants expressly stated in the contract. These are that the city should pay for the works to be created by the water company; and that the company should deliver possession thereof to the city "upon the payment to" it of the value of such property. There is no agreement, express or implied, that the company should yield up possession before payment. Even in the case of a strict lease of land, where the lessee is to erect improvements to be paid for by the lessor at the expiration of the term, the lessor is entitled to possession at the end of the term without payment, leaving the tenant to his action to recover the value only where there is no express agreement in the instrument which changes the result that flows by implication from the mere nature of a lease; in such a case, if the clear meaning of the contract is that the lessor is to have possession only upon payment, then he has no right to possession prior to payment. Such a case is presented in Swift vs. Sheehy, 88 Fed. Rep., 924. There the court say: "There is in this contract, distinguishing it from the cases principally relied upon by the defendant's counsel, an express provision that the lessor can only become the owner of and entitled to the possession of the buildings and improvements upon the payment to the lessees of the value thereof. * * * At common law, under a contract of lease by which the lessee was permitted to make improvements upon the land during the existence of his lease, without further express reservation as to the termination of the term, the improvements went with the land back to the lessor. The contract in question does not only require the lessor, at the termination of the lease, to pay the lessees the value of the improvements, but it, in effect, entitles the lessees

to retain the ownership and posession until the lessor shall pay them therefor."

But the case of National Waterworks vs. Kansas City, 62 Fed. Rep., 853, decided by Judge BREWER, more nearly approaches the case at bar than any to which our attention has been called. In that case the contract between Kansas City and the waterworks was very similar to the one in the case at bar. There the contract ran for twenty years; the water company was to create waterworks, which the city was to have at the expiration of twenty years upon payment of the value; and a trial court had held that at the end of the twenty years the city was entitled to take possession of the waterworks without payment. But the circuit court of appeals reversed the case; and Judge BREWER, in delivering the opinion of the court, among other things, said: "We dissent *in toto* from the claim of the city that at the lapse of the twenty years the title to this property, with the right to possession passed absolutely to it, without any payment or tender of payment, leaving only to the company the right to secure compensation by agreement or litigation as best it could. * * * Now, the familiar and ordinary law of business transactions is that he who parts with title receives at the time payment. In other words, payment of price and transfer of property are contemporaneous and concurrent acts. When it is affirmed that a contract made by a municipality contemplates that he whose money builds and constructs, and therefore establishes title to property, shall surrender his title and possession without payment, or even the amount thereof determined, the language compelling such a construction must be clear and imperative. There is no such language in either the act or the ordinance. While it is true that the act provided that no grant so made shall confer the right to operate the water works for any period beyond twenty years, yet such provision is no more imperative than the one that at the expiration of twenty years the city shall purchase and pay therefor. * * * In so far, therefore, as the decree of the circuit court attempts to transfer the title and the possession to the city before payment, we are constrained to hold that it was erroneous." Our conclusion therefore is, both upon principle and authority, that the city at the expiration of the thirty years, had no right to

the possession of the water works without payment, or tender of payment, of their value."

In the case at bar the express provision of the contract is that "the telegraph line, poles, wires and fixtures covered by this contract shall be the property of the telegraph company, and shall form part of its general telegraph system." Either this is a definite covenant of the ownership of this property for all time or it is limited by the term of the contract. There is, however, nothing whatever in the contract to indicate the latter. Nor is there anything whatever to indicate that it was the thought of the parties to the contract that this telegraph line would cease to exist along and upon this line of railway as indicated in the recital of the agreement.

In the argument in the Court below there was the suggestion that it was claimed by the Telegraph Company that the eighth clause was intended to be a grant of a right of way, and was alone relied on as such by it.

If the eighth clause had never been in the contract, still, we insist that the remaining provisions of the contract would clearly evidence an intent to grant a right to construct a telegraph line along the railway, and would constitute the grant of such right. The eighth clause of the contract is not so much a grant of the right of way along the railroad, (for that is necessarily implied in the remaining provisions for the construction, maintenance and operation of the telegraph line), but it is a specific stipulation in the nature of a regulation of the right of way granted—a limitation on the power of the railway company to grant to other companies a similar right. As

we have said, if this clause be entirely stricken from the contract, a right of way along the railway is necessarily implied from the other provisions, and the expressed purpose of the parties in entering into the contract. The Circuit Court held that the grant of right of way to the telegraph company was merely incidental to the mere personal agreement of the parties, and to enable that personal agreement to be carried out. But this construction contravenes the purpose of the parties, as expressly stated by them in the agreement. They express their main purpose in the words, "along which railroad and any extensions or branches thereof it is proposed that a telegraph line shall be constructed, maintained and operated."

A telegraph line requires a right of way and lands for the support of poles and wires. This is clearly recognized by the statutes of Michigan. In the Act of 1871 of that state, by Section 5 authority is given to a Telegraph Company organized under that act to enter upon and construct and maintain lines of telegraph through, along and upon any of the public roads and highways, or across or under any of the waters within the limits of the state, and to erect the necessary fixtures for sustaining the wires of such lines. By Section 6 of the same act it is provided that any person over or through whose lands said lines shall pass, or upon whose lands the piers, posts or abutments shall be placed, may make application to the Circuit Court, and thereupon a commission shall be appointed to fix the damages. This is, in other words, an appropriation proceeding similar in all essentials to the proceeding to value right of way for a railway company.

In the act of 1846, as amended in 1873 (Sec. 3686, Revised Statutes, Edition of 1882), Section 1 provides

"that any person or persons may be and they are hereby authorized to construct and maintain lines of electric telegraph, together with all necessary fixtures appurtenant thereto, from point to point upon and along any of the public roads, highways or railroads, and across, along or under any of the waters, rivers or bridges within the limits of this state, and upon or over any of the public lands of this state, or upon or over the land of any individual—the owner of any land through which said telegraph line may pass, and railroad corporation on whose right of way the same may be constructed, having first given consent."

This telegraph line was as much realty as the railway itself. It requires for the support of its poles and wires either an ownership in fee of a right of way, or an easement therein.

Upon this is put permanent structures to support wires. Such a line has been held to be realty.

Am. Un. Tel. Co. vs. Middleton, 80 N. Y., 408.

It is capable of being mortgaged as real estate. Indeed could not be mortgaged otherwise.

Boston Safe Dep. and Trust Co. vs. B. & M. Tel. Co., 36 Fed. Rep., 288.

In the case at bar, therefore, the railroad company granted a right of way out of its real property and upon this the telegraph company constructed its telegraph lines. The property conveyed, it is true, was mortgaged, but that does not prevent the grant of the right of way from being valid, subject to the lien of the mortgage. Under the Act of Congress of July 24th,

1866 (Rev. Stats., Sec. 6253 *et seq.*, 14 Stats., 221), it is provided

'that any telegraph company now organized or which may hereafter be organized under the laws of any state in this Union shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States over and along any of the military and post roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable waters of the United States, provided that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams or waters or interfere with the ordinary travel on such military or post roads."

The bill sets forth in its sixth paragraph the rights claimed under this act and also that it is admitted that the complainant had duly accepted its provisions long prior to the contract of September 25th, 1890. When, therefore, in that contract it contracted for the right to construct its telegraph lines upon this railway, and provided that the use of that line might be enjoyed by the railway company up to the last day of the period named in the contract, and that this line was to be the property of the telegraph Company and form part of its general system of telegraph, it must be considered that it was doing this with a view to the obligations defined in the Act of Congress to the Government of the United States. This contract must be construed in the light of these undertakings. These considerations very strongly enforce the conclusion heretofore urged that in entering into the contract of September 25, 1890, the parties did not contemplate a mere temporary occupancy of the railroad by the telegraph, ending with the 25 years, but something more permanent than this, although

they only defined the terms of such occupancy for the period of 25 years. In the opinion of TAFT, J., it is stated that it was necessary to have an arrangement under the Act of Congress of July 24th, 1866, before a telegraph company could occupy the right of way, citing Telegraph Co. vs. Telegraph Co., 96 U. S., 1 (Record, p. 44). But this contract was such an arrangement as under the Act of Congress the owner of the railway was at full liberty to make. We shall show later by authorities, the mortgagor in possession was the only one with whom it could be made in September, 1890.

II.

The Circuit Court of Appeals erred in holding that the Circuit Court as a Court of Equity had no power to grant such a decree as would afford full relief to both parties to the litigation.

The Telegraph Company, while insisting that it has full power to continue to maintain and operate its telegraph line upon this railway, does not claim for a moment that it can do so freed from any obligation to the defendant. While it contracted with the owner of the railway, yet what interest it acquired was subject to the mortgage existing upon the property. The situation of the parties in view of the contract, the foreclosure of the prior mortgage, and the Act of Congress, was this. The contract granted a right to con-

tract, maintain and operate a telegraph line, which was built.

The Act of Congress gave to the telegraph company all the public right which Congress could grant for the construction, maintenance and operation of this public agency, but provided no method of acquiring the private right of property needed, on which to locate and construct the line of telegraph. The Act of Congress necessarily implies power on the part of the owner of the railway to make some arrangement with the telegraph company for the use of this private property needed to construct the telegraph line. The telegraph line had, however, in this case, been constructed, but upon property subject to the mortgage. This mortgage had been foreclosed, and the mortgagees had purchased it, and conveyed to the defendant.

Under these circumstances is it true as the Circuit Court of Appeals held that a Court of Equity is powerless to so frame its decree as to protect the rights of all parties, or must it say that the only remedy it can furnish is to stand aside, and allow this telegraph line to be dismantled, and the wires, poles, batteries and instruments removed by the telegraph company? As such they are worth little more than the cost of removal, and would be of little use elsewhere. Such was evidently never the contemplation of the parties to the agreement, and such a result should not be caused at the instance of a mortgagee unless necessary to the protection of his rights. In the cases cited in the opinion of the Circuit Court of Appeals, where the controversy was wholly between individuals, no other rule than that announced would fully protect the rights of the parties. In the case at bar the

parties to the contract are not mere private individuals, but are charged with obligations to the public, and the Court can so frame its decree as to enable those duties to be discharged, and the private right protected at the same time. This, we insist, there is no difficulty in doing.

If the parties were mere private persons, having no public relations and obligations, the question would be easily answered by the simple suggestion that the mortgagee could foreclose his mortgage, and upon the foreclosure sale certain well-settled principles would apply. But when we come to deal with two corporations, both public in character, agencies of the General Government and of the public, as instruments of commerce, both State and interstate, very different considerations arise. It was not competent for the State of Michigan, by a prohibitory statute, to prevent the Western Union Telegraph Company from constructing its telegraph line along the Frankfort and Southeastern Railroad. The Telegraph Company did not need any enabling legislation from that State in order to have the full legal right to operate and maintain its telegraph lines along this railroad. All it needed was in some way to acquire the right of way for these lines from the owner of the soil. This it secured by the contract, so far as the railroad company was concerned. Its right thus obtained was incumbered by the mortgage. The interest of the mortgagee was not valued and paid for, and equitably the utmost the mortgagee is entitled to is the compensation for the interest thus acquired by the Telegraph Company which by the aid of a statute might be condemned and valued.

The suggestion may be made that, while this is true, yet the Act of Congress has not provided a method for

condemning the property, and ascertaining the damages, or the exercise of the right of eminent domain by the telegraph company, nor has the State of Michigan provided a method, and therefore these considerations can have no force and no weight. The question then recurs whether in the view of a court of equity, the Western Union Telegraph Co. being charged with public duties and responsibilities, and not having the power by law to condemn, the Court is not competent to so frame its decree that the public interest will be advanced and at the same time the private right be fully protected. In other words, whether the proper view to take of the situation of the parties here is not, if the assignee of the mortgagee wishes to repudiate this contract, and not be bound by any of its provisions, that then the ultimate of its rights is that its interest in this property which will be taken by the telegraph company will be valued, as upon an appropriation, and it will be given the right to full compensation, and that thereupon the telegraph company will be permitted to continue its occupation, and enjoyment of the easement granted by the Frankfort and Southeastern Railroad Company.

The right of a court of equity under circumstances similar to this to frame its decree so as to protect both the public right, and the private property right is very clearly set forth in the case of McElroy vs. Kansas City (21 Fed. Rep., 257). In that case the complainant was the owner of a lot on the corner of two streets in Kansas City. The grade had been established by the city by an ordinance, the carrying into execution of which would leave the lot of the complainant many feet above Sixth street, and seriously damage the value of the property. Under the Constitution of Missouri it was

provided that private property should not be taken or damaged for public use without just compensation. The Legislature had made no provision by which the city could proceed to ascertain the amount of the damage in a case of this character, and it was insisted on the part of the complainant that the provision of the Constitution was not self-executing, and that the city, having no statutory authority to condemn, or to ascertain the amount which its operations would damage the lot in question, was powerless to proceed, and that the only thing for the Court to do was to grant a perpetual injunction against the city's action, and thus tie up and prevent a great public improvement until the Legislature could act. It will be observed that there was not here, as in the case at bar, great public interests involved in the way of intercommunication, and action on the part of an agency of the Federal Government, but simply the question of the action by one of the municipal subdivisions of the State affecting a small section of the public. BREWER, then Circuit Judge, lays down the following general propositions as controlling in the decision which he reached (p. 261):

"FIRST. A Chancellor, in determining an application "for an injunction, must regard not only the rights of "the complainant which are sought to be protected, "but the injuries which may result to the defendant or "to others from the granting of the injunction. If the "complainant's rights are of a trifling character; if the "injury which he would sustain from the act sought "to be enjoined can be fully and easily compensated, "while, on the other hand, the defendant would suffer "great damage, and especially if the public would suffer "a large inconvenience if the contemplated act was "restrained, the lesser right must yield to the larger "benefit; the injunction should be refused, and the "complainant remitted to his action for damages. This "rule has been enforced in a multitude of cases, and "under a variety of circumstances, and is one of such

" evident justice as needs no citation of authorities for
" its support.

" SECOND. When the defendant has an ultimate right
" to the act sought to be restrained, but only upon
" some condition precedent, and compliance with the
" condition is within the power of the defendant, in-
" junction will almost universally be granted until the
" condition is complied with. This principle lies at
" the foundation of the multitude of cases which have
" restrained the taking of property until after the pay-
" ment of compensation, for in all those cases the
" Legislature has placed at the command of the de-
" fendant means for ascertaining the value of the prop-
" erty. In those cases the courts have seldom stopped
" to inquire whether the value of the property sought
" to be taken was little or great, whether the injury to
" the complainant was large or small, but have con-
" tented themselves with holding that, as the defend-
" ant had full means of ascertaining such compensa-
" tion, it was his first duty to use such means, deter-
" mine and pay the compensation, and until he did so
" the taking of the property would be enjoined.

" THIRD. Where the defendant has an ultimate right
" to do the act sought to be enjoined upon certain
" conditions, and the means of complying with such
" conditions are not at his command, the courts will
" endeavor to adjust their orders so on the one hand
" as to give to the complainant the substantial benefit
" of such conditions, while not restraining the defend-
" ant from the exercise of its ultimate rights. Thus,
" in the case at bar, the defendant has of course the
" ultimate right to grade this street. As a condition
" of such right is a payment of damages, but it has no
" means of ascertaining those damages; no tribunal
" has been created, no provision of law made, for their
" ascertainment. Hence, if possible, the Court should
" provide for securing to the defendant this ultimate
" right, and at the same time give to the complainant
" the substantial benefit of the prior conditions.

" FOURTH. In applying the rule first stated to a case
" like the one at bar, the Court should have principal
" regard to three matters:

" (1) The amount of injury to the complainant. It
" is obvious that a grade of a single foot in front of a
" city lot would work but trifling injury, while on the
" other hand the grade might be such as practically to
" destroy the value of the adjacent property. In the

" one case it would seem a great hardship to tie up " public improvement because of some trifling injury " to the complainant, the amount of which injury was " not attainable by any established means, and there- " fore that the party might justly be left to his action " for damages; while in the other case the Court might " well insist that the value of complainant's property " should not be wholly wrecked until such value has " been paid to him.

" (2) The Court will consider the solvency of the " defendant. If some irresponsible corporation should " seek, in the exercise of the power of eminent do- " main, and under the guise of the contemplated pub- " lic improvement, to do serious damage to property, " the Court should promptly say that the owner was " not bound to take the chance of collecting his dam- " age from such a corporation, and imperatively re- " quire the prior adjustment and payment of such dam- " ages; while if the party attempting the improvement " was a corporation of established and permanent solv- " ency, the Court might say that the complainant " would run little risk in pursuing simply his action for " damages.

" (3) If the improvement was one of great public " importance the Court would justly regard that as a " reason for not lightly interfering with the work, while " if the improvement was more of a personal specula- " tion and for private gain, the prior protection of the " complainant would be most rigorously insisted on. " Thus, if in the centre of a large and thriving city like " the defendant, some improvement was contemplated " which the necessities of busines proclaimed to be " urgent, the Court on no slight consideration should " interfere to delay or restrain it; while, on the other " hand, if it was some matter in the outskirts of the " city, having obviously principal reference to the pri- " vate speculation of the individual, and of no earnest " or urgent demand of public good, the attention of " the Court would be properly directed to the full pro- " tection of the complainant's prior right. I think " such considerations as these, and others of a similar " nature, when properly regarded by the Courts, will " afford ample protection to individual rights without " unnecessary interference with needed public im- " provements; and that, until the legislature makes " suitable provision for the ascertaining of damages to " property not taken, the Courts should be guided by

" them in determining all applications of this nature
" for an injunction.

" Now, looking at the facts of this particular case, it
" is evident that the injury to complainant's lot will be
" serious; that the solvency of the defendant is un-
" questionable, and that any judgment for damages
" against it can be easily collected; and also that the
" improvement is not one of pressing public necessity,
" but in the outskirts of the city, and having reference
" mainly to private benefit and individual speculation.
" I think, therefore, that the complainant is entitled to
" a restraining order, but at the same time it should
" not be absolute and unconditional."

" The section of the Constitution provides that this
" compensation shall be ascertained by a jury or Board
" of Commissioners of not less than three freeholders.
" It is within the power of a Court of Chancery to pro-
" vide a Board of Commissioners. The order, there-
" fore, will be that upon the giving a bond in the sum
" of $3,000, and the filing of a stipulation to accept
" such damages as shall be ascertained in the manner
" herein provided in full satisfaction of all claims
" against the defendant, the defendant will be restrained
" from grading said street.

" Provided, that at any time the defendant may, upon
" 20 days' notice, apply to either of the Judges of this
" Court for the appointment of a Board of Commission-
" ers of three freeholders to ascertain and report the
" amount of damages which complainant will sustain
" by reason of the grading of said street, and upon the
" payment of the damages so reported by such com-
" missioners the injunction will be vacated."

The principles of this case are approved by this Court in Osborne vs. Missouri Pacific Ry. Co., 147 U. S., 248. See language of opinion by FULLER, Ch. J., pages 259 and 260.

Other notable instances of similar decrees by a court of equity will be found in the elevated railroad litigation arising in New York City.

In these cases the Court, acting as a Court of Equity, ascertained the value of the easements taken by the elevated railroad company, and decreed that

upon the payment of such sum, an injunction should issue restraining the railroad company from continuously trespassing upon pla ntiff's property, and also requiring the owner of the property to execute a deed to the railroad company upon the payment of the money.

Galway vs. Elevated Railroad Co., 128 N. Y., 132.

Shepherd vs. Elevated Railroad Co., 117 N. Y., 442.

Perhaps a hundred cases in New York applying these principles have been adjudged. The Reports of the New Yorks Courts are full of them.

In these cases the valuations made by the Courts are made upon the same principle that a condemnation award would be made. That is, how much has the property owner been damaged by the taking for the purposes of the elevated railroad of his easements of light and air. In other words, how much less valuable is the property in consequence of the building of the elevated railway and thereby taking a portion of the property of the abutting owner. This is made quite clear in the opinion in Shepherd vs. Manhattan El. R. Co., cited above. GRAY, J., says (p. 448):

"The present action was necessarily one on the equity side of the Court, as the main relief sought was the injunction against the defendants. The decisions of this Court have settled the rights of abutting property owners to an easement in the street, occupied by the defendant's structure, for free egress and ingress and for the free admission of light and circulation of air. That easement is property and constitutes an interest in real estate, and because the defendant's railroad was a use of the street, not originally designed, and was an appropriation to themselves of property rights, it cannot be maintained without compensation being made to the abutting owners for the injury in-

flicted upon their property and rights ; and for the annoyance, caused through the operation of the road, to the abutting owners, in their enjoyment of the use of their property, they are entitled to recover such damages as may be shown to be the result of defendant's acts (Story vs. Elevated R. Co., 90 N. Y., 122 ; Lahr vs. New York Elevated R. R. Co., 104, *Id.*, 268). Although property owners have a remedy at law for the intrusion upon their rights, yet, as the trespass is continuous in its nature, they can invoke the restraining power of a Court of Equity in their behalf, in order to prevent a multiplicity of suits, and they can recover the damages they have sustained as incidental to the granting of the equitable relief (Williams vs. N. Y. C. R. R. Co., 46 N. Y., 97 ; Henderson vs. N. Y. C. R. R. Co., 78 *id.*, 423). The violation of the property rights of abutting owners being adjudged in such an action, the awarding of damages, sustained in the past from the defendants, follows ; they being, on equitable principles, deemed incidental to the main relief sought (Story Eq. Jur., 794, 795, 799)."

The relief thus accorded to the parties in these suits is in all respects a condemation in a court of equity. The fictions indulged in, in describing it, in no way change its essential character. The elevated railway is built in the street ; the easements are taken ; and the Court values them as though it were a Commission appointed under the statute. It says to the railway company, pay this amount, or allow an injunction to issue. It says to the owner of the property, make a conveyance of the easements to the elevated railway company upon the payment of the amount of this valuation. Thus the rights of both parties are fully protected, and the easements are, in fact, condemned to the use of the elevated railway. This power is, however, denied by the Circuit Court of Appeals to exist in a Court of Equity (Record, p. 44).

See, also,

Phillips vs. Thompson, 1 John's Ch., 131.

Law of Eminent Domain, Randolph, Secs. 384, 385, and cases cited.
Dows vs. Congdon, 16 How. Proc. Rep., 571.
North Hudson R. R. Co. vs. Boorason, 28 N. J. Eq., 450.

To illustrate our contention fully, suppose instead of the telegraph company being one party to the agreement, the other party to the agreement had been a railroad corporation which had made an arrangement for the use of a portion of the Frankfort and Northeastern Company's right of way for its track, and had constructed at great expense, and was operating at the time the foreclosure of the mortgage took place, its railroad thereon. Can it be contended for a moment that the mortgagee or purchaser at the foreclosure sale not having made that railroad company a party to its foreclosure could summarily take possession of its railroad, and oust therefrom the operating railroad company as the defendant sought to do the telegraph company in this case? Would not its remedy be either to foreclose its mortgage as against this railroad company, making it a party to the foreclosure, thereby giving it a right to redeem, and if it did not redeem, cutting off all the rights in the premises by a proper decree; or else by a proceeding under the statutes to have its interest in the property taken by the railway company, properly condemned and valued, and the amount of the valuation secured to it?

Mills on Eminent Domain, Sec. 74, and cases cited.
Lewis on Eminent Domain, Secs. 324 and 628.

None of the authorities which we have found have

gone to the length of holding that, under circumstances of that character, an action of ejectment would lie to enable the mortgagee or purchaser at foreclosure sale to obtain possession of the property in cases where the property had been acquired by contract or condemnation by a company having a right to make appropriation, and a mortgagee had not been made party to the proceedings to condemn. In such cases the interest of the mortgagee is not taken away from him by the proceedings to condemn, but the remedy of the mortgagee is, not to take possession of the property condemned, but to have his interest in the property valued, and the valuation paid to him. The Court below, therefore, in decreeing, as was done in this case, the entire destruction or cessation of any rights in the Western Union Telegraph Company along and upon this railroad of the Frankfort and Southeastern Railroad Company, has wholly lost sight of the important functions which this telegraph company was endeavoring to discharge to the United States Government and to the public by the construction of this line of telegraph along this railroad. It ignored entirely not only the express grants of the right of way and the right to construct a telegraph line thereon, contained in the contract, but also the public character and the public duties of the telegraph company, and that in the construction of the telegraph along the railroad it was exercising a right secured to it by the Act of Congress of July 24, 1866, and that all that it needed to enable it to construct its line of telegraph was the acquisition of the private right of way from the railway company ; that it had already granted to it by the Act of Congress what

could not be taken away from it by the Legislature of Michigan or affected by the legislation of that State, the full corporate power to construct this line of telegraph as a public agency.

The whole theory of the opinion of the able and learned Judge below upon which the decree is based, and of the Circuit Court of Appeals, is that the telegraph company's rights in and to the railway were personal. That it had by the contract secured the right to place a few poles and wires upon the railway and upon the expiration of the contract had only a license to enter and remove them. But this is at entire variance with the entire scheme of the contract, and with the essential nature of a telegraph line.

A court of equity, in dealing with the subject, will therefore consider the telegraph company in building and maintaining this line, as being not in any sense dependent upon the railway company, but in the performance of this public function as an independent public agency. The provisions respecting the use of the lines as defined in the contract of September 25, 1890, were merely temporary provisions separate and independent from the other provisions of the contract by which there was assured to the telegraph company a right of way and a right to maintain existing lines and to construct additional lines upon and along the railway.

Therefore, under the most favorable view of the defendant's claim, the decree should have simply enjoined the defendant from interfering with the property of the complainant, and provided a method for ascertaining the value of the interest of the mortgagee in the rights granted to the telegraph company by the contract, and

making the injunction conditional upon the telegraph company compensating the mortgagee for such rights.

There is a clear distinction between the power of a court of equity in a case where a telegraph line is already built, and the Court is appealed to to settle the rights of the parties, and the case where the line is not yet constructed. A court of equity could not entertain a bill to condemn a right of way along a railway for a telegraph line, although it has full power, as we contend, to adjust the relations of the telegraph company with the railway company after the line of telegraph is built. The Court of Appeals overlooked this obvious distinction in deciding this case.

See

A. & P. Tel. Co. vs. U. P. Ry. Co., 1 McCrary, 541.

W. U. Tel. Co. vs. U. P. Ry. Co., 1 McCrary, 419.

W. U. Tel. Co. vs. U. P. Ry. Co., 1 McCrary, 558.

W. U. Tel. Co. vs. U. P. Ry. Co., 1 McCrary, 581.

The courts make a clear distinction between public or *quasi* public corporations in the occupation of lands, and mere private individuals. The same act of trespass or occupancy is attended with very different results in the two cases.

In California Railroad Company vs. Southern Pacific Railroad, 20 Am. & Eng. R. R. Cases, 309 (advance case of California, decided May 22, 1885), we have a case of a proceeding by one railroad company against another to ascertain the compensation for a crossing, and also to acquire lands for depot purposes. In this case, the court say in the opinion :

"There was evidence of consent by the defendants to the entry and building of the road by plaintiff on sections of land 7, 19, 21 and 33, and that the entry of plaintiff and its acts were not trespasses. The value of the ties, rails, etc., were not therefore to be considered as part of the realty in determining the compensation to be awarded for the lands taken (Cal. S. P. R. R. Co. vs. Armstrong, 46 Cal., 90).

In Toledo, Ann Arbor & Grand Trunk Ry. Co. vs. Dunlap *et al.* (Advanced Case, Michigan, January 5, 1882) 5 A. & E. R. R. Cas., page 378, we have a proceeding for condemnation, in which a railroad company had constructed its road over property of the defendants without authority from the owners in fee, having, however, a license to do so from the holder of a contingent dower interest. The question arose upon the assessment of damages as to the elements to be considered in the value of the land. CAMPBELL, J., in the opinion rendered in the supreme court upon appeal, says:

"We are of opinion that no error was committed in excluding from the compensation allowed Dunlap the value of the railroad track laid upon the land. We think the case cannot be distinguished from Morgan's Appeal, 39 Mich., 675. The railroad company, whether rightfully or wrongfully, laid this track while in possession and for purposes entirely distinct from any use of the land as an isolated parcel, and it would be absurd to apply to land so used and to the railway track laid upon it the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in the case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending possession, and in a proceeding to obtain a legal and permanent right to occupy the land for this very purpose, there would be no sense in compelling them to buy their own property. Whatever right of redress, if any, Dunlap may have for a tortious occupancy previous to these proceedings, or whatever rights of property he might have in case the

company abandoned the road entirely and left the track untouched, we think that, so long as it is in possession and legal measures are proceeding to secure a right to retain it, that this structure belongs to the company whether intruders or not."

In the case of Morgan's Appeal referred to by Justice CAMPBELL (39 Mich., 675), commissioners were appointed under the statute of Michigan to assess damages to Morgan by reason of taking of his land by the Chicago and Northwestern Railroad Company. The land was situated in the outskirts of the city of Lansing; the appellants Morgan resided in the city of New York, but had an agent at Lansing whose duty it was to pay taxes, and guard the land against unlawful intrusion. In 1876 the company made entry upon the land, built their road, and occupied for the purpose of their track between three and four acres, and placed about forty feet of a large bridge upon the land. While it thus occupied the land it made efforts to acquire the land by private and amicable means, and the company proceeded with its improvements, believing that such efforts would be successful. The efforts, however, failed, and proceedings were instituted to secure condemnation in the probate court under the Michigan statute. The commissioners appointed reported the amount of compensation due from the company, which did not include the improvements the company had made upon the land, but simply the value of the land exclusive of the track and bridge. The owners of the land objected, and on appeal insisted that the improvements on the land should be valued. GRAVES, Justice, in the course of the opinion, says:

"The first objection is that the commissioners refused to allow appellants (Morgan) for the road itself

and part of the bridge constructed by the company prior to these proceedings. These works cost between seven and eight thousand dollars, and appellants contend that the company in making them on the land acted without authority, and simply trespassed, and the works became fixed and incorporated with the land and were required to be considered as part of it and in the appellants' ownership for the purpose of estimating their damages. There is no basis in law or equity for this claim. It is not consistent with a fair interpretation of the stipulation for the creation of the commission, nor reconcilable with the actual attitude the parties bore to each other whilst the work was going on. The company did not act wantonly or oppressively. They had reasonable expectation of getting the right of way on private terms and without difficulty. But it is not intended to rest upon such considerations.

"The proceeding is not an action by appellants to recover damages for past trespasses, nor an ejectment on their part to compel the company to restore possession, and as incidental thereto to forfeit the erections constructed in their own wrong.

"The nature of it is different. It is no part of its object to compel the company to sacrifice the cost of its works upon the land either by enforced abandonment on the one hand or enforced payment of the value to the land owners on the other. It is a proceeding by the company to secure in a lawful way the right to take and use the land, a right not previously obtained, and the only terms the law imposes, in case the taking and use are sanctioned, is the payment of such 'damages or compensation as ought justly to be 'made.' Certainly it would not be 'just' to require the company in this proceeding to pay the appellants for the identical works the company have constructed in order to carry out the specific use and purpose for which the land is required."

In Greve vs. St. Paul & Pacific R. R. Co. (26 Minn., 66) a similar question was before the court of Minnesota, where a railroad company had wrongfully entered upon lands of the plaintiff, and upon a subsequent condemnation the question arose as to the right to include in the estimated value of the land the value of the property which the railroad company attached to the

soil. GILFILLAN, C. J., passing on the question, concludes his opinion as follows (p. 70):

"When the proceedings were commenced it does not appear; but it is not questioned on the argument that in taking possession of and constructing its road over the land it intended to make this a part of its general line, and ultimately to secure, in th manner prescribed by law, the right to retain the land for that purpose; and the company was operating under a charter which, in terms, authorized it to enter upon and construct and operate its road over the land in advance of making the compensation required by the constitution; although, notwithstanding this, the company was, under the decisions of this court upon the constitutionalty of this part of the charter, a trespasser in constructing its road over the land without first making compensation, we think these facts ought to be considered when the question between the company and owner is, What is just compensation to be made by the former to the latter for the taking?

"When we are not bound down by the technical rules of property, but may enter into consideration of what under the circumstances is just and equitable between the parties, we can see no reason for allowing to the plaintiff the value of the roadbed, ties and rails which the defendant has placed upon the land. The court below was right in excluding such value."

BERRY, J., concurring, says:

"I agree to the general conclusion arrived at by the majority of the court in this case—viz., that the plaintiff is not entitled to recover for the roadbed, ties and rails; but I dissent from the reasoning by which that conclusion is reached. I think with some modification the reasons given for an analogous conclusion by the Supreme Court of Pennsylvania, in Justice vs. Nesquehoning Valley R. Co. (87 Pa. St., 28), are much more sound and satisfactory."

In the case cited by Justice BERRY (Justice vs. Ry. Co., 87 Pa. St., 28), Chief-Justice AGNEW delivered the opinion of the court. It was a case where a railroad company was a trespasser upon the lands of Justice and others, having attempted to agree with the owners

of the land upon terms, but having entirely failed to do so before it entered upon the lands, and constructed this railroad. The proceeding came into court under a statute to view and value lands taken by the railroad company for its railroad, and to assess damages therefor and came into the supreme court by appeal from the finding of the viewers. Justice AGNEW, after stating the facts and stating that the entry was clearly a trespass and was irregular, that it subjected the company to an action of ejectment, in which judgment was first rendered April 3, 1874, and execution stayed until the proceeding to assess the damages should be completed, says:

"The company being a trespasser and the entry not in conformity to law, the question is whether this irregular proceeding operated as a dedication in law of the property in the ties and rails to the owners of the land, so as to entitle them to include these things in the assessment of the damages under the railroad law and to recover their value as an accession to the value of the land taken by the company. A careful consideration and analysis of the case before us will show that it differs in essential respects from that of a mere *tort feasor* whose structures upon the land of another enure to the benefit of the owner of the land.

"The common law rule is undoubted that a trespasser who builds on another's lands dedicates his structures to the owner. The reason is obvious, for like him who sows where he cannot reap, he can obtain no advantage by his wrong and having affixed his chattels to the realty they become part of it and he cannot add further injury by tearing them down. Even a tenant is to a modified extent affected by the same rule. If he improves under a covenant, the covenant governs his right of removal. So, if in favor of trade he erects structures for his business, doing no unnecessary or irreparable injury to the land, yet having done this without consent, he must remove his erections before the expiration of his term, otherwise he will be presumed to dedicate them to his lessor. There is also to be noticed a clear distinction between putting

down a railroad track under a lease and an act of appropriation of the land under a charter. This is clearly pointed out in Heise vs. Penn. R. R. Co. (12 P. F. Smith, 67). The very intent of an appropriation of land is to place upon it and own and use the structures necessary to carry out the charter purpose. Hence no dedication of the material can be inferred in such a case. In this we perceive how differently the common law itself must view the application of its own rules. The great merit of the common law so often commended by jurists is its plasticity as a system of principles which can be adapted to new conditions in the affairs of men. *Modern inventions and discoveries have so far transcended the conditions of former times that to apply the rule as to a mere trespasser whose entry is a tort pure and simple, to the case of one authorized to enter for a great public purpose merely because of an irregularity, would be as vain as to attempt to dress a full-grown man in the garb of his childhood.*

" This is not a case of a mere trespass by one having no authority to enter, but by one representing the State herself, clothed with the power of eminent domain and having a right to enter and to place these materials on the land for a public use, materials essential to the very purpose which the State has declared in the grant of the charter. It is true the entry was a trespass by reason of the omission to do an act required for the security of the citizen, to wit, to make compensation or give security for it. For this injury the citizen is entitled to redress but his redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser the owner of the land may take and keep his structures, *nolens volens*, but not so in this case. For though the original entry was a trespass, it is well settled that the company can proceed, in due course of law, to appropriate the land and to reclaim and avail itself of the structures laid thereon (Harrisburg vs. Crangle, 3 W. & S., 460; McClinton vs. R. R. Co., 10 P. F. Smith, 409; Railroad Co. vs. Bursen, 11 *Id.*, 379). And in Harvey vs. Thomas, 10 Watts, 63, it was held that subsequent proceedings to assess compensation was a protection against a recovery of vindictive damages.

"Another evident difference between a mere *tort feasor* and a railroad company is this: The former necessarily attaches his structure to the freehold, for he has no less estate in himself; but the latter can take an easement only and the structures attached are subservient to the purpose of the easement. A railroad company can take no freehold title and when its proper use of the easement ceases the franchise is at an end. There is no intention in fact to attach the structure to the freehold. We have, therefore, these salient features to characterize the case before us, to wit, the right to enter on the land under authority of law to build a railroad for public use; the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity for their use in the execution of the public purpose; and, lastly, the power to retain and possess these chattels and the structures they compose by a valid proceeding at law notwithstanding the original illegality of the entry. Under the law the owner has his appropriate remedy, his action of ejectment to recover and retain his land and its use until the company shall proceed according to law, and his action of trespass to recover damages for the injury sustained by the unlawful entry and holding possession and whatever loss has been caused by these illegal acts.

"There are some analogies bearing remotely on the question before us, showing that property is not gained by the owner of land because found upon it. Thus in the case of property carried off by a flood and stranded on the premises of another, the owner may follow it, enter and take it, or if the owner of the land convert it may recover its value (Forster vs. Bridge Co., 4 Harris, 393; Etter vs. Edwards, 4 Watts, 63). And even a sale will not carry unknown secreted valuables (Hutmacher vs. Harris, Admr., 2 Wright, 491).

"But a case bearing a close analogy—indeed, deciding the principle on which this case rests—is Meig's Appeal, 12 P. F. Smith, 28. In the year 1862, the United States, in the prosecution of the war, erected buildings on the public common of York for military barracks and hospitals. After the close of the war, the government was about to remove the material when the borough authorities proceeded to enjoin the removal on the ground that the buildings has been affixed to the realty. In that we said, referring to Hill vs. Sewald,

3 P. F. Smith, 271, that the old notion of a physical attachment had long since been exploded in this State, and that the question of a fixture or not depends on the nature and character of the act by which the structure is put in place; the policy of law connected with its purpose, and the intention of those concerned in the act. This language applies emphatically to the case now under consideration. It was further said the nature and character of the structure are also to be considered. There were not improvements to be made for objects connected with the soil—neither intended to give value to it or to receive value from it; so, precisely, here, the railroad having no connection with the improvement of the land or its uses, 'the act '[says the opinion] is distinguishable from that of an 'ordinary tresspasser. There was no intent to im-'prove the ground or to make it accessory to some 'business or employment. There is not an assertion 'of title in the soil or of an intention to hold adverse 'possession. Indeed, there was not a single element 'in the case which characterizes the act of a *tort feasor* 'who annexes his structures to the freehold, and is, 'therefore, presumed to intend to alter the nature of 'the title into realty, and thereby to make a gift of it 'to the owner of the freehold.' This language strongly characterizes the case before us. Here, as there, the purpose is a public use; there was no intent to hold adversely as a trespasser nor to improve the land, and make it useful and valuable by the erection. The rails and ties were not intended to be attached to the freehold, but were laid down as a part of an easement under a franchise of the State. There was no intent to use the land as an owner would, and no intent to abandon the materials to the use of the owner; but they were subject to a legal proceeding resulting in maintaining both the ownership and use for the charter purpose. We think, therefore, the ownership of the rails, ties, &c., did not vest in the plaintiff in error by the mere trespass in the original entry."

A similar question was before the court of Illinois in Emerson vs. Western Union Railroad Company (75 Ill., 176), where the Racine and Mississippi Railroad Company, fifteen years prior to the commencement of the proceedings, constructed a railroad track upon the

lands of the appellant, and the appellee, its successor, had used this track continuously down to the time of the commencement of these proceedings. On the hearing the appellant insisted that the road having been placed on his land without compensation and condemnation, the materials thereof were *prima facie* part of the realty and he was entitled to their value as part of the damages for taking the lands. This was denied in the supreme court, upon the ground, as stated by McAllister, J., "that the petition alleged the construction of the road without compensation with the permission and consent of the owner. If that were true, the appellant could not be allowed the value of the road as a part of his realty. The question as to the effect of mere silence on the part of the owner having knowledge, or, in other words, implied consent, is not involved."

In Northern Central Railway Company vs. Canton Company of Baltimore (30 Md., 347), the Northern Central Railroad Company, after the year 1855 and before 1859, constructed, at its own expense, a railway track upon the lands of the Canton Company. The route adopted was agreed upon by them and at the time of the construction of the road the Northern Central Railroad had reason to believe it was laying its railroad upon lands over which it had free right of way. In 1859 the Canton Company, as the result of misunderstandings between the companies, revoked the license under which the railway company was in possession of the land. In 1860 it brought two suits, one in ejectment, the other of trespass *quare clausum fregit*. During the pendency of these suits the railway company filed a bill for specific performance and praying for an injunction. The Canton Company had succeeded in having this bill dismissed and recovered

judgment in both actions at law. A subsequent action of ejectment was brought in January, 1865, for the roadbed and a judgment obtained in June following, and possession given under a writ *habere facias possessionem* to the Canton Company. The rails and other materials which formed a part of the railway constructed by the appellant were upon the land at the time and the question arose in this case who was the rightful owner of them. After thus stating the nature of the controversy and the general rule of the common law as to annexation and the exceptions thereto as to trade fixtures, Judge BRENT, delivering the opinion of the court, says:

"We consider the property in dispute in this case as coming within both of these exceptions. The railway of which it formed an important and necessary part cannot rationally be supposed to have been designed for any other purpose than that of trade connected with the ordinary business and pursuits of the railway company. It certainly was not necessary to the enjoyment of the freehold or in any manner necessary and convenient for the occupation of the land by the party entitled to the inheritance. Had it been voluntarily abandoned, it is not pretended that it would or could have been used by the appellee as a railway. The conclusion cannot be avoided that it was built by the appellant with a view and for the purpose of facilitating and increasing the business and trade in which the corporators, under their corporate powers, had embarked as carriers. A railway is certainly quite as essential to the trade and business of a railway company as a steam engine and the house which may cover it, or any other fixture, can be to the miller or miner. We do not mean to be understood as denying the doctrine laid down in Farmers' Loan & Trust Company vs. Hendrickson (25 Barbour, 484), cited with approval in 18 M. D., 103, that the roadbed of the railway, the rails fastened to it and the buildings at the depots are real property. *Prima facie*, a house with its foundation planted in the soil is real property, yet, when it is accessory to trade and, in law, a trade fixture, we find all the authorities regard it as personal property. The

same doctrine is applicable to the railway in question. As a general rule it would be regarded as real property, but under the circumstances of this case, coming as it does within the definition of a trade fixture, it becomes personalty, liable to the same rules that govern other personal property.

"All the surrounding circumstances show that, at the time this railway was laid upon the land of the appellee, it was not intended that it should be merged in the freehold. It was built at the sole cost of the appellant, with its money and labor, under the reasonable belief that it had the free right of way, and under the license and by the permission of the owner of the soil. It is true this license was not of such a character as made it irrevocable or gave the appellant any sufficient standing in a court of equity to obtain a decree for a specific performance, yet it was a license justifying an entry, and whatever was done under it before its revocation is to be regarded as legal, and not as the act of a trespasser. The road thus laid must have been intended by both parties for the exclusive use of the railway company, and that use could not have been fully enjoyed without the right to hold and control it. The appellant could not otherwise have directed its management and taken up and replaced such rails and other materials as were necessary in its judgment for the repairs and proper condition of the road.

In Heise & Mifflin vs. Pennsylvania R. R. Co. (12 P. F. Smith, 62 Penn. St., 67), Heise & Mifflin owned a piece of land on the Pennsylvania through which a branch of the Harrisburg Railroad passed with two tracks. This railroad was leased to the Pennsylvania Railroad Company, which located four additional tracks upon the property. Heise & Mifflin prayed for viewers to assess the damages sustained by them under the Pennsylvania statute. The viewers reported a lump sum of $6,000. The railroad company excepted on the ground that it held a portion of the land under divers leases from Heise & Mifflin who received an annual rent from the same. The Court of Common Pleas set aside the report upon an opinion that under

the terms of the leases the railroad company had the privilege to occupy the ground as they had done. The petitioners, Heise & Mifflin, took out a writ of error to the supreme court, where Agnew delivered the opinion. He says :

"Owing to the defective legislation, for such we must call it, in relation of the mode of proceeding to exercise the State's power of eminent domain by this company, it is difficult to determine the rights of the parties. The law makes no provision for the record of the act of the company in taking property either by filing a draft or an instrument of appropriation, defining with precision the extent, boundaries, location and pupose of the property taken. Entry is *in pais* and the surveys appear to be in the keeping of the company only. In the present case the only draft is the one presented to the viewers and returned with their report, and it exhibits with no precision the defined boundaries of the lands taken. The viewers say the draft was furnished by the company. From this draft it would seem to be impossible to determine whether the company intended to exercise the power of the State in taking the whole number of feet (796) or only that part not held under lease– to wit, ninety-six feet; all this is essential to be known. The question of damages depends on the taking, that is to say, the appropriation of the property to railroad purposes. This is a very different thing from the mere sale of the property under a lease of years. There is nothing to prevent a railroad company having title to the use and occupancy of the land under a lease from laying down rails upon it and using them for a track for engines, cars, &c., if not forbidden in the lease, or if waste is not committed by such acts as evidently injure and destroy the soil. But the appropriation of the property for the uses of a railroad under the power granted to take it for such purposes is essentially different from its mere use during the term of the lease. In the latter case no title is acquired to the easement, and the rail must come up before the expiration of the lease; but in the former a perpetual easement or right of way takes place. In one case the rent is all the compensation which the landlord can demand; in the other the owner is entitled to compensation or security for it before his right of property can be invaded."

In Oregon Railway and Navigation Company vs. Mosier (14 Oregon, 519) the railroad company had obtained the right of way over land from the person supposed by it to be the owner, entered upon the land and constructed its road. Afterwards, the true owner being discovered, it brought an action to condemn the lands, and the owner insisted on having the value of the railroad improvements estimated in the assessment of the value of the property. LORD, C. J., delivering the opinion in the Supreme Court, after considering the common-law rule of annexation and the extent to which modern courts were inclined to relax the strict rules of the ancient law upon the subject, proceeds to point out the distinction between the case at bar and ordinary cases of annexation, first with respect to the right of the State to appropriate and to vest such power of eminent domain, or to make its agent for that purpose the railway company. He then proceeds as follows:

"In view of the rights thus delegated by the State to the corporation, the purposes for which they were conferred, the public use for which the land is condemned, the just compensation required to be paid for its appropriation, and the great interest the public has in the successful operation of the road, it seems to us that these are elements which plainly distinguish the acts of a corporation, though technically a trespasser in building its road upon lands without proper authority therefor, from the acts of the common trespasser in affixing chattels to the freehold, and to render inapplicable the strict rule of law which would treat such improvements as fixtures and part of the realty, or to require the law to be administered upon the just and liberal principles of the exceptions to that rule, which would regard such improvements as personalty and exclude them in computing the value of the land. This distinction and its application to the facts here have thus been very clearly stated by BICKNELL, C. J.:

"The duty rested upon the appellee, before the taking and appropriation of the lands, to have caused

in the appointed mode, an ascertainment of the compensation to which the owner was entitled and to have made payment of the compensation. Neglecting this duty, the entry upon and possession of the lands was wrongful; no title to them was acquired and the title of the owner was not divested. Neglect of the duty, wrongful entry and possession, does not preclude the appellee from resorting subsequently to appropriate proceedings for the acquisition of the lands, and, of consequence, of availing itself of all the structures it may have placed thereon (Justice v. N. V. R. R. Co., 87 Pa. St., 28; Secombe v. R. R. Co., 23 Wall., 108). Though the appellee was a trespasser by reason of the neglect to pursue the proper remedy for acquiring the lands—acquiring them without the consent of the owner—there is in the right continuing in him to pursue the remedy, rendering the possesssion rightful, and by which the title may be acquired, a plain distinction between the appellee and a common trespasser. As against such trespasser the proprietor can keep the lands and keeping them hold the improvements he may have annexed to the soil. No remedy is given the trespasser by which he may acquire the use and enjoyment of or title to the lands. There is also another distinguishing fact: The structures of the appellee were dedicated, not to the use and enjoyment of the freeholder, but to public use which are the consideration for the grant to the appellee for the corporate franchise and of the right in the exercise of these franchises to take and appropriate private property. These elements of the case distinguish it from that of the trespasser entering upon land and affixing chattels to the freehold for his use and enjoyment which he must intend to convert into realty, and which, following the title of the soil as one of its incidents, passed to the proprietor."

Jones vs. N. O. & S. R. R. Co., 70 Ala., 272.

"Equally to the point is the language of AGNEW, J." (quoting extract from opinion already cited, *ante*, and further citing Justice v. Ry. Co., 87 Pa. St., 28; See, also, Toledo, &c., R. R. Co. v. Dunlap, 47 Mich., 456; Lyon v. Ry. Co., 42 Wis., 538; Daniels v. Ry. Co., 41 Iowa, 52).

To the same general effect see case of Moore vs. Vallentine, 77 N. C., 188; Aspinall vs. Chicago & N.

W. R. Co., 41 Wis., 474; California and Pacific R. R. Co. vs. Armstrong, 7 Am. & Eng. Ry. Cas., 259; North Hudson Ry. Co. vs. Booraem, 14 Am. Railway Report, 202; see, also, Central Branch R. R. Co. vs. Fritz, 20 Kansas, 430; also Lyon vs. Green Bay & M. Ry. Co., 15 Am. Ry. Reports, 91.

III.

The rights of the telegraph company could not be terminated by a foreclosure to which it was not a party.

Long before the making of this contract, the telegraph company had duly filed with the Postmaster-General its acceptance of the provisions of this act of Congress, and therefore was entitled to all the privileges and powers conferred by the act of July 24th, 1866. It was therefore an agency of the United States, empowered on the 25th of September, 1890, to construct, maintain and operate, as such agency of the general government, telegraph lines along every railroad in the United States, because all railroads, by act of Congress, are post-roads (Rev. Stat., Sec. 3964; 17 Stat., 301, Sec. 201).

Under the construction of the act of July 24, 1866, in Pensacola Telegraph Co. vs. Western Union Telegraph Co. (96 U. S., 1), it was not possible for any State to prohibit the complainant from constructing lines of telegraph along any railroad within its borders; the only limitation upon its power thus to construct lines of telegraph was the requirement that in

some way it should have acquired the right of any private proprietor whose property it was compelled to use or occupy for such construction.

By the contract of September 25, 1890, it obtained of the Frankfort and Southeastern Railroad Company all which it needed under the act of July 24th, 1866, to enable it fully to construct, equip and maintain a telegraph line along that company's railroad, and thereafter, over that line, to do for the general government, and for private individuals as an agency of interstate commerce, all that its legal obligations required it to do. The grants in this contract in connection with this Act of Congress made the right of the Telegraph Company to the use of the right of way of the Railroad Company for its poles and wires complete. The fact that, as a part of the construction of this line, and in connection with the construction, it had made certain provisions for a division of the use of the line when constructed, and as to how the line should be operated after construction, and as to how the cost of repair, maintenance and reconstruction should be borne, in no way limited or qualified its inherent rights and duties as an agency of the United States Government, having a right to maintain this line, and to operate, and maintain it thereafter along and upon this line of railway.

Did the fact that there was at the time this contract was made, on the 25th of September, 1890, a mortgage existing upon that property, prevent the Frankfort and Southeastern Railroad Company from granting a right of way to this agency of the United States Government, and did it prevent the Western Union Telegraph Company, as such agency, from receiving such grant, with all the rights and benefits that result therefrom, as

to the maintenance and operation of a telegraph line? Does the fact of the existence of such mortgage enable the mortgagee, or the purchaser under foreclosure sale of such mortgage in a suit to which the Telegraph Company was *not a party*, to terminate the right granted by the contract of the 25th of September, or does the right granted by the contract, pass to the telegraph company, burdened simply with the mortgage upon that which is granted?

As we understand from the Record (pp. 36–40, *et seq.*), the Circuit Cort of Appeals affirms the decision of the Circuit Court on the ground that "the entry of the mortgagee or its grantee into possession would have avoided all the telegraph company's rights, and that its alleged easement granted for 25 years would be at an end. The grantee of the easement for 25 years certainly stands upon no higher ground than the lessee for such a term. Indeed his possession is not so good in this case" (Record, p. 40). Again the Circuit Court of Appeals say, "It is, however, well settled that no contract of lease or otherwise which the mortgagor may make with respect to the land either enures to the benefit of the mortgagee or his binding on him. There is in such case no privity of either estate or contract between the mortgagee and the lessee of the mortgagor to bind either, and the entry of the mortgagee into possession under the mortgage merely avoids the lease, and releases the lessee from any obligation." Citing two cases (Record, p. 46).

The opinion thus assumes that the contract of September 25, 1890, is either a lease for 25 years of the mortgagor and subject to all the technical rules and principles applicable to leases or that it confers no greater rights than a lease. Indeed, the court says

that the position of the Western Union Telegraph Company under this contract is not as good as that of a lessee. We deny fundamentally and *in toto* that this is a correct construction of the contract of September 25, 1890, or that the principle is sound that "no contract of lease *or otherwise* which a mortgagor may make with respect to the land either enures to the benefit of the mortgagee or is binding on him."

Let us put several cases to illustrate and test the doctrine of the court.

(a) Suppose the same contract which was entered into September 25, 1890, had been entered into between the same parties—to wit, the Frankfort and Southeastern Railroad Company—prior to the execution of the mortgage which was afterwards foreclosed, and the telegraph line had been constructed under that contract also prior to the foreclosure, and the Telegraph Company had been in the possession and the use and enjoyment of the line so constructed. If the opinion of the Circuit Court of appeals is correct, that this is a mere personal contract and confers no right or interest in the land, it would logically result that in that case the foreclosure of the subsequent mortgage would cut off the rights of the Telegraph Company. Can this be the law?

(b) Suppose, after the execution of this mortgage by the Frankfort and Southeastern Railroad Company, The Western Union had applied to the said Railway Company for the privilege of constructing upon its right of way a telegraph line and the Railway Company had executed a grant of the privilege or right to the Telegraph Company to construct and operate a telegraph line upon the right of way of the Railway

Company for a period of 25 years or longer, and the Telegraph Company had accordingly entered into possession and constructed the line, is it to be claimed that in that event the foreclosure of the prior mortgage would cut off the rights of the Telegraph Company if it were not a party to the proceeding? To hold this would be to hold that a prior mortgagor can cut off the rights of a subsequent grantee of rights in the premises without that subsequent grantee's being a party to the foreclosure suit. This, we submit, cannot be the law.

(c) Suppose, instead of making the contract of September 25, 1890, in the form it was made, the Railway Company had made a subsequent mortgage to the Western Union Telegraph Company, to secure any covenant or promise. Of course the Western Union Telegraph Company would be a necessary party to any foreclosure suit or its rights under its mortgage would be unaffected.

Our contention is that this contract grants a right of way just as effectually as if it had been contained in a formal instrument granting to the Telegraph Company the right and privilege to erect and maintain a line of telegraph which the company had on the faith of the instrument erected and constructed. Its rights in a court of law, certainly in a court of equity, are just as effectually secured as if they had been conferred by a formal deed.

Our contention, therefore, is, that this contract is not a mere lease, and is not subject to the rules or principles applicable to leases; but that it is a grant of rights in, to and over the right of way of the Railway Company, which, we claim for the reasons given in a subsequent part of this argument, are in perpetuity.

But for all the purposes of this case it is sufficient to say that it was a grant for 25 years. The right of the grantee cannot be cut off to use and enjoy its telegraph line thus constructed, at least during the period of 25 years, by a foreclosure of a prior mortgage unless the Telegraph Company is a party to such foreclosure.

Let us test the question further by supposing that instead of making the agreement the telegraph company had condemned the right to construct its telegraph line upon and along this railroad, without making the mortgagee a party to the appropriation proceedings, what then would be the trights of the parties. Would its rights terminate on heconclusion of the foreclosure proceedings, to which it had not been made a party ?

Under the law of Michigan, as settled by its courts, if the telegraph company at the time of making this contract had instituted a condemnation suit to condemn this right of way, it would not have been necessary to make this mortgagee a party to the condemnation proceedings. In the case of Grand Rapids vs. Grand Rapids and Indiana Railroad Co. (58 Mich., 641) an attempt was made by the City of Grand Rapids to open a street across the property of the defendant railway company. The railway company objected, and gave evidence of a trust mortgage of all its road, property and franchises to secure the payment of bonds, but which reserved to the railway company the ordinary control of its affairs until dispossessed, and claimed that the trustees under this mortgage were necessary parties to the proceeding to condemn this right of way. This contention was overruled by the Supreme Court in the case above cited. How does the status of the telegraph company

differ from its position, if it had condemned a right of way, without making the mortgagee a party to the proceeding?

The Telegraph Company, in the case at bar, came into a court of equity to sustain its rights of property, and the defendant also came into court and filed its cross-bill. The rights of the parties must, therefore, be judged upon equitable considerations. The defendant stands as the successor in title to a mortgagee of the Frankfort and Southeastern Railroad Company, which latter company entered into a contract granting a right of way and other privileges to the telegraph company along the line of railroad, thus subject to mortgage. This mortgage having been foreclosed without the telegraph company having been a party to the proceedings in foreclosure, the question arises, What are the respective rights of the parties in and to this railroad property? The telegraph company has duly acquired a right of way for its telegraph line, with the right to maintain it, so far as the Frankfort and Southeastern Railroad Company could grant it. The transfer to the Western Union Telegraph Company of the right of way, was subject to the prior mortgage of the Frankfort and Southeastern Railroad Company upon the right of way granted.

At the time the contract of September 25, 1890, was made, the mortgage was not in default, and, therefore, the mortgagor, notwithstanding the mortgage, was to be regarded in all respects as the owner, and entitled to deal with the mortgaged property as such owner. (Jones on Mortgages, Secs. 11, 664 and 676). Under the Act of Congress of July 24th, 1866, the railway company was the only one then competent to give the

authority to the telegraph company to enter upon the railway, and build its line there. The contract was executed by both parties under seal, was followed by possession, the expenditure of money, and, therefore, vested in the Western Union Telegraph Company all the rights intended to be secured by the contract, subject only to the prior mortgage of March, 1889.

The contract makes a present grant of a right of way to the telegraph company. This right of way thus granted was the grant of an easement, an interest in the realty, the consideration for which was the benefits to the railroad company from the use of the telegraph line. The Western Union Telegraph Company shortly after entered into the possession of this easement, and continued in possession, and was in possession at and during the foreclosure. The doctrine of the English law that an easement can only appertain to a dominant estate is not the doctrine of the American courts (Goddard on Easements, pp. 7, 10, 11). The American authorities universally speak of the right of way granted to a railway or telegraph company as an easement, regardless of whether the same is connected with any estate or not (Pierce on American Railways, pp. 157, 158).

This fundamental distinction and provision of this contract was entirely lost sight of by the Courts below in treating the contract of September 25, 1890, as purely a personal covenant between the railway company and the telegraph company. The contract was much more than this. It secured to the telegraph company an interest in the right of way of the railway company. Even if, however, the matter rested not in grant, but in covenant as between the parties, and even if the contract of September 25, 1890, by reason of

not being under seal, or for other causes, was not a sufficient grant of an interest in the realty, still the Western Union Telegraph Company, being in possession, and thus there being notice to the mortgage, the rights of the Western Union Telegraph Company would be protected by a court of equity precisely the same as though the grant was perfect (Goddard on Easements, p. 23).

Hodge vs. Sloan, 107 N. Y., 244, 250, and cases cited.
Western Union Tel. Co. vs. Western & Atlantic R. R. Co., 91 U. S., 283.

When, therefore, this mortgage was foreclosed in 1895, in proceedings to which the telegraph company was not a party, the effect of such foreclosure was simply to make the purchaser at the foreclosure sale, the assignee of the mortgages foreclosed, as between it and the telegraph company.

2d Jones on Mortgages, Sec. 1395.
Freeman on Void Judicial Sales, Sec. 52.
Brobst vs. Brock, 10 Wall., 519.
Johnson vs. Minckler, 10 Johns., 480.
Jackson vs. Bowen, 7 Cowen, 13.
Vanderkemp vs. Shelton, 11 Paige's Ch., 28.
Vroom vs. Detmas, 4 Paige's Ch., 526.
Gage vs. Brewster, 31 N. Y., 218.
Robinson vs. Ryan, 25 N. Y., 320.
Miner vs. Beckman, 50 N. Y., 337.
Gilbert vs. Kelly, Walker's Ch., 494.

In the case of Parker vs. Childs, 25 N. J. Eq., 41, it was directly held that the foreclosure and purchase by the mortgagee of the first mortgage does not extinguish as against the second mortgage the prior mortgage (citing Hunt vs. Hunt, 14 Pickering, 37; Davis vs.

Winn, 2 Allen, 111 ; Lamb vs. Montague, 112 Mass., 352).

When the contract of September 25, 1890, was made, the railroad company was without a telegraph line. A telegraph line, or the use of one, was absolutely essential to the convenient, and even to the successful, operation of a railroad. The railroad company had two courses open to it: (1) It could build a telegraph line at its own sole expense and own it, and when so built it would fall within the security of the prior mortgage as an annexation or by virtue of the clause relating to after-acquired property ; or (2) the railroad company could do as it did—namely, make with the telegraph company an arrangement whereby the telegraph company (it being authorized so to do by its charter, the laws of Michigan, and the Act of Congress of July 24, 1866, *supra*) would build a telegraph line on the right of way of the railroad company *and own such telegraph line*, but under an arrangement to give the railroad company the use of the telegraph line so far as needful for its purposes, under terms and provisions like those of the contract of September 25, 1890, in respect of such use.

This contract, therefore, was a perfectly natural and lawful contract to make. The contract is dual in its character. It first provides for the construction and ownership of a line of telegraph ; such line by the express terms of the contract to be the *property of the telegraph company*. Then it contains numerous provisions with the accompanying details concerning the respective rights of the telegraph company and the railroad company to the use of the telegraph line thus constructed. Put in plain and simple language the grant by the railroad company to the telegraph com-

pany of the right to construct its telegraph line on the right of way of the railroad company as contained in the contract of September 25, 1890, may be thus expressed :

" We, the railroad company, in consideration of the " provisions of this contract for the benefit of the rail- " road company, do hereby grant to you, the telegraph " company, the right of way to construct a telegraph " line in the manner provided in this contract, said " line when constructed to be the property of the tele- " graph company, and for a term of twenty-five years, " and thereafter until the notice provided in the con- " tract shall be given to terminate it, we are to have " certain rights in the use of that telegraph line."

This contract clearly gave to the telegraph company the right to erect and maintain a telegraph line upon the right of way of the railroad company. The right of the telegraph company thus to occupy with its poles and wires the right of way of the railroad company is an easement. Being made by contract under seal it is an easement perfect at law. If, however, it be only an equitable as distinguished from a legal easement, it gives in a court of equity all the rights of a legal easement.

The telegraph company's money brought this telegraph line into existence, or largely so. The telegraph company was in admitted possession, and therefore the mortgagee, when it came to file its foreclosure bill, had full and constructive notice of the rights of the telegraph company. Can any one deny that the railroad company, having thus constructed a line of telegraph, and being in the actual possession and the use of it, would have a right to redeem from the mortgage ? If it had a right to redeem, then it is elementary and fundamental that its rights can not be cut off in any

suit to which it is not a party; and therefore the position above taken in the brief is undoubtedly sound, namely, that any foreclosure of this mortgage to which the telegraph company was not a party is wholly ineffectual as to the telegraph company; does not impair or even affect its rights; and as to the telegraph company such a foreclosure simply makes the purchaser at the foreclosure sale an assignee of the mortgage with no more rights as to the telegraph company than if it had not been foreclosed at all.

Since the railroad company, if the mortgage had not been foreclosed, could not have terminated the rights of the telegraph company, it follows that the purchaser at the foreclosure sale in question cannot do so; and those rights continue, unless the rights of the telegraph company shall be foreclosed in a suit or proceeding to which it is a party.

In the light of these considerations it is insisted that the conclusion arrived at by the Courts below, that the foreclosure of the mortgage terminated all the rights of the telegraph company upon the railway, was erroneous and should be reversed.

Respectfully,

RUSH TAGGART.

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